IN THE

Supreme Court of the United States

NO. 76-1738

WILLIAM M. SEWELL,

Appellant,

VS.

STATE OF GEORGIA,

Appellee.

APPELLEE'S MOTION TO DISMISS AND MOTION TO AFFIRM IN THE ALTERNATIVE WITH SUPPORTING BRIEF

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

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Appellee, State of Georgia, moves to dismiss pursuant to Rule 16(1)(b) on the grounds that the appeal does not present a substantial federal question; that the judgment rests on an adequate non-federal basis; and that the Supreme Court of Georgia had and followed the precedents set by this court which adequately covered all questions raised on appeal.

In the alternative, appellee moves to affirm the judgment of the Supreme Court of Georgia, pursuant to Rule 16(1)(c) on the grounds that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

In the alternative, appellee further moves to affirm pursuant to Rule (1)(d) on the grounds that the sale of the magazine "Hot and Sultry" by the appellant was and is sufficient to support his single-count conviction and the appellant specifically does not challenge that portion of the Georgia statute proscribing and prohibiting the sale of the magazine. See appellant's JURISDICTIONAL STATEMENT, page 4.

ARGUMENT

I.

SECTION 26-2101(c) OF THE CRIMINAL CODE OF GEORGIA DOES NOT TOTALLY PROHIBIT THE DISSEMINATION OF DEVICES DESIGNED OR MARKETED AS USEFUL PRIMARILY FOR THE STIMULATION OF HUMAN GENITALS, NOR IS THE STATUTE UNCONSTITUTIONAL FOR ANY REASON ASSERTED BY THE APPELLANT.

The statute under which appellant was charged, tried, and convicted is Section 26-2101 of the Criminal Code of Georgia, Georgia Laws 1968, pages 1249, 1302, as amended by Georgia Laws 1971, page 344, and further amended by Georgia Laws 1975, page 498.

To fall within paragraph (c) of Section 26-2101 of the Criminal Code of Georgia, any person charged with an offense thereunder must, *knowing the obscene nature of the devices*, sell, lend, rent, lease, give, advertise, publish, exhibit, or otherwise disseminate the device or devices to another person, or possess them with intent to do so. The statute is therefore aimed at a particular segment of society, i.e., those who distribute material of a sexual nature, those who purvey filth for monetary gain. These persons must be assumed to possess specialized knowledge of the use and purpose of the things they sell. The statutory language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices employed by persons who distribute such merchandise. See *Chaplinsky v. New Hampshire*, 315 U.S. 568; *U.S. v. Petrillo*, 332 U.S. 1, 7-8; and *Boyce Motor Lines, Inc. v. U. S.*, 342 U.S. 337, 340. The section in question is not void for vagueness in that men of common understanding must not necessarily guess at its meaning. Persons have fair warning of the prohibited conduct. *Bouie v. City of Columbia*, 378 U.S. 347. Additionally, sections of the code which relate to the same subject matter must be construed together. Section 26-2021 of the Criminal Code of Georgia (Georgia Laws 1975, page 402) makes the instrumental manipulation of another's genital organs for money a crime. When the two sections are read together, 26-2101(c) and 26-2021, the law is made clear that the distribution of instruments commonly and primarily used to masturbate or erotically stimulate the genital organs is prohibited conduct.

Artificial sexual organs or extensions have been held to be devices designed and adapted for indecent or immoral use under 18 U.S.C.A. 1462 and thereby obscene. *U.S. v. Gentile*, 211 F. Supp. 383 (D.C. Maryland 1962). The language in 18 U.S.C.A. 1462 has been held to be constitutional. *U.S. v. Orito*, 413 U.S. 139 (1973); *U.S. v. Reidel*, 402 U.S. 354; *U.S. v. 37 Photographs*, 402 U.S. 376; *Manual Enterprises v. Day*, 370 U.S. 478. A state court has applied the obscenity statute to artificial penises. *People v. Clark*, 304 N.Y.S. 2d 326 (1969).

The statute in question here does not encompass

conduct that is constitutionally protected and does not infringe upon the right of privacy, as it does not fall within the prohibition announced in *Stanley v. Georgia*, 394 U.S. 557. See also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49; and *U.S. v. Orito*, 413 U.S. 139.

Appellant contends that the standards or guide lines set forth in *Miller v. California*, 413 U.S. 15; 93 S. Ct. 2607 (1973), used in determining obscenity in press materials, applies to the devices described and prohibited by Criminal Code Section 26-2101(c). We disagree. The Miller guide lines were set up by this court to be used in protecting the rights guaranteed by the First Amendment to the Constitution of the United States, freedom of speech and freedom of the press. The devices prohibited by Code Section 26-2101 are neither speech nor press materials and are therefore not protected by the First Amendment.

The appellant compares the Georgia obscenity statute with that dealt with by the Supreme Court of the United States in the case of *Griswold v. Connecticut*, 381 U.S. 479 (1965); 85 S.C. 1678. The court there dealt with statutes prohibiting the use of contraceptives.

The Georgia statute does not prohibit the use of the devices described in Code Section 26-2101(c) by married couples or anyone else. As a matter of fact and law, the statute provides exceptions whereby persons can avail themselves of such devices, Code Section 26-2101(e). The procedure required in the exception is the same as that required for dispensing most drugs, including those used for birth control.

The court in *Griswold*, supra, recognized a distinction between "forbidding the use of contraceptives rather

than regulating their manufacture or sale." 381 U.S. 479, 485; 85 S.C. 1678, 1682 (9, 10).

The court in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), again recognized a distinction between the rights of a theater and the rights of privacy of its customers. The court there recognized legitimate state interests in stemming the tide of commercialized obscenity, the interests of the public in the quality of life and the total community environment, the tone of commerce in great city centers, and possibly, the public safety itself. The court there mentioned the arguable correlation between obscene material and crime in holding that state interests are involved.

There are numerous statements and restatements in *Paris Adult Theatre I v. Slaton*, supra, reiterating the rights of the several states to legislate in matters dealt with by the Georgia Legislature in Code Section 26-2101. Some of those excerpts are:

> ". . . From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs. . . . The same is true of the federal securities and antitrust laws and a host of federal regulations. . . . Understandably, those who entertain an absolutist view of the First Amendment find it uncomfortable to explain why rights of association, speech, and press should be severely restrained in the marketplace of goods and money, but not in the marketplace of pornography." 413 U.S. 49, 61; 93 S.C. 2628, 2637 (11).
>
> ". . . The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family

life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a state from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data. . . . It is argued that individual 'free will' must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that government cannot legitimately impede an individual's desire to see or acquire obscene plays, movies, and books. We do indeed base our society on certain assumptions that people have the capacity for free choice—those in politics, religion, and expression of ideas—are explicitly protected. Totally unlimited play for free will, however, is not allowed in our or any other society. . . ." 413 U.S. 49, 63; 93 S.C. 2628, 2638.

". . . Even assuming that petitioners have vicarious standing to assert potential customers' rights, it is unavailing to compare a theater, open to the public for a fee, with the private home of *Stanley v. Georgia*, 394 U.S., at 568, 89 S. Ct., at 1249, and the marital bedroom of *Griswold v. Connecticut*, supra, 381 U.S., at 485-486; 85 S. Ct., at 1682-1683. . . ." 413 U.S. 49, 65; 93 S.C. 2628, 2639 (13, 14).

". . . We have declined to equate the privacy of the home relied on in *Stanley* with a 'zone' of 'privacy' that follows a distributor or a consumer of obscene materials wherever he goes." 413 U.S. 49, 66; 93 S.C. 2628, 2640 (17-21).

The State of Georgia has a legitimate interest in the subject matter of Code Section 26-2101(c) and the same is not unconstitutional for any reason asserted by the appellant.

II.

JURY INSTRUCTIONS ON SCIENTER THAT REQUIRED THE STATE TO PROVE BEYOND A REASONABLE DOUBT THAT THE ACCUSED HAD KNOWLEDGE, EITHER ACTUAL OR CONSTRUCTIVE, AND THAT CONSTRUCTIVE KNOWLEDGE IS KNOWLEDGE OF FACTS WHICH WOULD PUT A REASONABLE AND PRUDENT PERSON ON NOTICE AS TO THE SUSPECT NATURE OF THE MATERIAL, ARE SUFFICIENT TO MEET CONSTITUTIONAL MINIMUM STANDARDS.

Section 26-2101 of the Criminal Code of Georgia provides, in part, as follows:

"(a) a person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word 'knowingly,' as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter, and *a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material.* . . ." (Emphasis added)

The trial court charged the jury on scienter according to the provisions of the Georgia statute, supra, and this charge is in keeping with a line of cases on the question of scienter in obscenity cases dating back to the year 1896 when the court held that

the person charged with the offense of mailing obscene material must know *or have notice of the contents* of the material.

> "The inquiry, in proceedings under Rev. Stat. §3893, is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail *by one who knew or had notice at the time of its contents*, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails." (Emphasis added) *Rosen v. United States*, 161 U.S. 29 (1896).

Rosen did not require the accused to have knowledge of the obscenity of the material, only *notice of its contents*.

". . . Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.

We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be. . . ." *Smith v. California*, 361 U.S. 147, 154 (1959).

The Georgia statute, 26-2101 supra, is very similar and compares to New York statutes dealt with by the

court in *Mishkin v. New York*, 383 U.S. 502 (1966) and *Ginsberg v. New York*, 390 U.S. 629 (1968).

The *Mishkin* case pointed out that the New York Court of Appeals had construed Section 1141 of the New York Penal Law to require the "vital element of scienter," and it defined the required mental element in these terms:

> "a reading of the statute (§1141) as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised. . . ."

Section 26-2101 of the Georgia Code requires "knowledge of facts which would put a reasonable and prudent person on notice," while Section 1141 of the New York Penal Law requires the accused to be "in some manner aware."

The statute dealt with in *Ginsberg* defined knowingly as "knowledge" of, or "reason to know" of, the character and content of the material.

Neither *Mishkin* nor *Ginsberg* requires actual knowledge as contended by the appellant herein. Both cases were reviewed and followed in *Hamling v. United States*, 418 U.S. 87 (1974), where the court construed 18 U.S.C. §1461, and held:

> "To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of 18 U.S.C. §1461 nor by the Constitution."

In the case of *Kuhns v. California*, No. 76-970, this court recently denied petition for certiorari, 21 CrL 4078, to review jury instructions based upon the California obscenity statute which defines "knowingly" as "[be] aware of the character of the matter. . . ." *California v. Kuhns*, 61 Cal. App. 3d 735, 132 Cal. Rptr. 725, 737 (1976).

Appellant concedes that proof of scienter may be made by circumstantial evidence. Appellee contends and respectfully submits that to prove the accused was aware of facts that would put a reasonable and prudent person on notice of the suspect character of the material, is proof of knowledge of the character of the material by circumstantial evidence.

In the case of *Nash v. United States*, 229 U.S. 373 (1913), the court said:

> "In many instances a man's fate depends upon his rightly estimating, that is as the jury subsequently estimates it, some matter of degree, and there is no constitutional difficulty in the way of enforcing the criminal provisions of the Sherman Anti-Trust Act on the ground of uncertainty as to the prohibitions."

Whenever the law draws a line, there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so, it is familiar to the criminal law to make him take the risk. *Nash v. United States*, supra; *United States v. Wurzbach*, 280 U.S. 396, 399 (1930). One who goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340.

In summary, on the question of scienter, the Georgia law requires and the jury was instructed that the State must prove, as a bare minimum, that the appellant had knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. No more has ever been required. "Notice of its contents" is required by *Rosen v. United States*, supra; "in some manner aware" was sufficient in *Mishkin v. New York*, supra; "reason to know" was sufficient in *Ginsberg v. New York*, supra; "be aware of the character of the matter" was sufficient in *Kuhns v. California*, supra; eyewitness testimony that the appellant viewed the film is not necessary, *Smith v. California*, supra; and proof of knowledge of the legal status of the material is not required, *Hamling v. United States*, supra.

III.

THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE THE DEVICES SEIZED BY THE OFFICERS AT THE TIME APPELLANT WAS ARRESTED.

Officer Alexander "made a purchase of a book and an artificial vagina" from the appellant, the appellant was then arrested (T-8), and all the items that were *in plain view* and, in the opinion of the officers, designed or marketed as useful primarily for the stimulation of human genital organs were seized by the officers (T-8; T-18; T-19; T-20). No books or magazines were seized. The only book or magazine that was removed from the store was purchased.

The testimony of the officer left no doubt that this was a store operated for the purpose of selling sexually

oriented books, magazines, and devices described in Code Section 26-2101(c). The storefront had "great big, huge signs on it that says 'adult book store,' 'peep show,' and 'mini-movies,' I think, '25¢' or something like that all over the front windows" (T-8). The books were displayed on a book rack where the most stimulating sex scenes could be seen (T-11), all the material had price tags attached (T-14), and the devices, books, and magazines were all displayed in close proximity (T-14-15). Deputy Spence testified that he had gained his knowledge concerning the uses of the devices seized through previous investigations, talking to other persons about the devices, and by viewing advertisements that gave the uses of the devices (T-32).

The appellant contends that the devices seized are protected by the First Amendment to the Constitution and cites *Roaden v. Kentucky*, 413 U.S. 496 (1973) and *Lee Art Theatre v. Virginia*, 392 U.S. 636 (1969) as cases controlling in the seizure of such devices. Needless to say, we disagree. Both the cases cited are cases dealing with the seizure of motion picture films from commercial theaters. We would agree that motion picture films, books, and magazines would not be subject to seizure under the same set of facts and circumstances as those in this case in which the devices were seized.

There is a vast difference in devices designed and/or marketed as useful primarily for the stimulation of human genital organs on the one hand, and motion picture films, books, and magazines on the other; and on the one hand, to seize films, books, and magazines without a prior judicial determination would be a prior restraint of material protected by the First Amendment of the United States Constitution under the pres-

ent decisions of our appellate courts, while on the other hand, the dissemination of material described in Code Section 26-2101(c), prohibited by Code Section 26-2101(a), would not be, and was not in this case, a prior restraint of material protected by the First Amendment.

The Supreme Court of the United States in *Roaden v. Kentucky*, supra, recognized and made a distinction in making a determination as to reasonableness of the seizure, 413 U.S. 496, 501; 93 S.C. 2796, 2800 (1, 2).

The devices seized, not afforded protection under the First Amendment of the Constitution, are declared to be contraband under the provisions of Code Section 26-2104, and therefore subject to seizure under the same rules as other contraband such as illegal drugs, stolen merchandise, and other fruits of crime.

What a person knowingly exposes to the public, even in his own house or office, is not subject to Fourth Amendment protection. *Katz v. U.S.*, 389 U.S. 347, 351 (88 S.C. 507, 511) (1967).

Contraband items in plain view of police officers, in a place where the officers have a right and are authorized to be, are subject to and may be seized without a search warrant. *Coolidge v. New Hampshire*, 403 U.S. 443 (91 S.C. 2022) (1971); *Harris v. United States*, 390 U.S. 234, 236 (88 S.C. 992, 993) (1968).

The devices seized were in plain view of the officers while the officers were in a lawful position to view the items seized, and for that and the foregoing reasons asserted, no warrant was necessary to make a lawful seizure.

IV.

THE MATERIALS CHARGED AGAINST APPELLANT ARE OBSCENE AND ENTITLED TO NO PROTECTION UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

In a review of the magazine in question, "Hot and Sultry," the court will find not only nudity and lewd exhibition of the genitals by both males and females, but there are also explicit depictions of simulated heterosexual intercourse (back cover), simulated heterosexual cunnilingus (page 34), and simulated homosexual cunnilingus (page 26). Appellant contends that these depictions do not constitute hard core pornography, and in support of these contentions, appellant cites numerous cases in which convictions were reversed by this court. With the exception of *Jenkins v. Georgia*, 418 U.S. 153 (1974), all the cases cited by the appellant were decided during the period between *Roth v. United States*, 354 U.S. 476 (1957) and *Miller v. California*, 413 U.S. 15 (1973); a period when no majority of the court could agree on a standard to determine what constitutes obscene, pornographic material subject to regulations under the States' police power, and at which time convictions were reversed by the court summarily.

> "Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power. See, e.g., *Redrup v. New York*, 386 U.S. at 770-771, 87 S. Ct. at 1415-1416. We have seen 'a variety of views among the members of the Court

> unmatched in any other course of constitutional adjudication.' *Interstate Circuit, Inc. v. Dallas*, 390 U.S., at 704-705, 88 S. Ct. at 1314 (Harlan, J., concurring and dissenting)." . . . *Miller v. California*, 413 U.S. 15, 22, 88 S. Ct. 2607, 2614.
>
> "In the absence of a majority view, this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. *Redrup v. New York*, 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the *Redrup* 'policy.' See *Walker v. Ohio*, 398 U.S. 434-435, 90 S. Ct. 1884, 26 L. Ed. 2d 385 (1970) (dissenting opinions of Burger, C. J., and Harlan, J.). The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us." *Miller v. California*, 413 U.S. 15, 88 S. Ct. 2607, 2614 (Footnote 3).

In *Jenkins v. Georgia*, supra, the film "Carnal Knowledge" was in question and the scenes in which sexual conduct including "ultimate sexual acts" is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. Such is not the case in the magazine in question, for there the camera does focus on the bodies of the participants.

Appellee contends that the magazine is hard core pornography and obscene material when judged by the guide lines established in *Miller v. California*, supra, and the Georgia obscenity statute, Code Section 26-2101, which is patterned after the *Miller* case.

CONCLUSION

For all the foregoing reasons, the appeal should be dismissed; or in the alternative, the judgment of the Supreme Court of Georgia should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I have this day caused to be mailed three copies of the within motion, first class postage prepaid, to Robert Eugene Smith, Esq., 1409 Peachtree Street, N.E., Atlanta, Georgia 30309.

This 13th day of July, 1977.

Leonard W. Rhodes

LEONARD W. RHODES
Counsel for Appellee